

APPEAL NO. 040518
FILED APRIL 26, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 19, 2003. The hearing officer determined that the appellant (claimant herein) sustained an injury at work on _____; that the respondent (self-insured herein) is relieved from liability under Section 409.002 because the claimant failed to timely notify her employer of the claimed injury pursuant to Section 409.001; and that the claimant did not have disability. The claimant appeals, contending that the hearing officer erred in limiting her compensable injury; that she did timely report her injury; and that she did have disability. The self-insured responds that we should affirm the decision of the hearing officer.

DECISION

We reform the decision of the hearing officer by striking a factual finding of the hearing officer as surplusage. Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer as reformed.

We note that the issues reported out of the benefit review conference were injury, timely report of injury, and disability. There was no issue on extent of injury. We have encouraged hearing officers to indicate the nature of the injury when determining whether an injury existed. Also, we recognize that when disability is in issue, as it is here, the hearing officer may be compelled to explain findings concerning disability by indicating what the hearing officer believes the compensable injury to include and to not include. However, we have also stated that it is not appropriate for a hearing officer to make a final determination on the issue of extent of injury when the issue of extent of injury is not before the hearing officer. See Texas Workers' Compensation Commission Appeal No. 001239, decided July 13, 2000, and Texas Workers' Compensation Commission Appeal No. 002898, decided January 29, 2001. As we have done in earlier cases, we consider all findings by the hearing officer concerning the extent of the claimant's injury to be beyond the scope of the issue before him, and we consider them surplusage. Therefore, we reform the hearing officer's decision by striking Finding of Fact No. 10 in which the hearing officer finds that the claimant's fall at work did not result in any structural damage to her lumbar spine.

The pivotal issue in the present case is the issue of timely notice. The hearing officer concluded that the carrier was relieved of liability under Section 409.002 due to the fact that the claimant did not timely report the injury pursuant to Section 409.001. The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury occurred. Section 409.001. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ.

App.-El Paso 1965, no writ). Conflicting evidence was presented on the disputed issue of timely notice. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although there is conflicting evidence in this case, we conclude that the hearing officer's determinations on timely notice of injury are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W. 2d 175 (Tex. 1986).

The hearing officer did not err in determining that the claimant did not have disability as a result of the compensable injury from _____, through the date of the hearing. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Whether the claimant's compensable injury caused an inability to obtain and retain employment at preinjury wages was a question of fact for the hearing officer to resolve. There is sufficient evidence to support the hearing officer's determination that the claimant did not have disability. Cain, *supra*.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**BG
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Gary L. Kilgore
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Edward Vilano
Appeals Judge